UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-3562
No. 14-3239

Parsons Electric LLC

Petitioner/Cross-Respondent

v.

National Labor Relations Board

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS PETITION FOR ENFORCEMENT OF AN ORDER ISSUED BY THE NATIONAL LABOR RELATIONS BOARD

PETITIONER/CROSS-RESPONDENT'S REPLY BRIEF

FORD HARRISON, LLP
Alec J. Beck (MN 201133)
225 South Sixth Street
Suite 3150
Minneapolis, MN 55402
(612) 486-1629
Attorneys for Petitioner/Cross-Respondent Parsons Electric LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

In its Brief, Respondent National Labor Relations Board crystalized the actual areas of disagreement between the Parties. First Respondent outlines, at some length, a number of basic labor law principles operative here, none of which are in dispute. Respondent is less clear about describing the two main points of dispute between the Parties. Those points are: (1) whether a language change in an employee handbook, without more, creates a material "unilateral change" in terms and conditions of employment; and (2) whether Parsons' 2012 change in its handbook language actually did materially alter terms and conditions of unit members' employment.

ARGUMENT

1. Bargaining is Only Required over "Material" changes to Terms and Conditions of Employment

The Parties agree that Parsons must bargain over changes to existing terms and conditions of employment, so long as those changes are "material." "Material" in this context means "material, substantial and significant [changes] affecting the terms and conditions of employment." In Re Golden Stevedoring Co., Inc., 335 NLRB 410, 416 (2001). Employee breaks, the term at issue here, is a mandatory subject of bargaining. Litton Microwave Cooking Products, Div. of Litton Sys. Inc. v. N.L.R.B., 949 F.2d 249, 252 (8th Cir. 1991). Therefore, Parsons was required to bargain over its 2012 handbook change if that change "materially" changed existing rights to an employee break. None of this is in dispute.

The Respondent, however, appears to claim that whether a change is "material" is a question of legal interpretation in which the Court must defer to the NLRB. (Brief at 14, *citing* Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 496-97, 99 S. Ct. 1842, 60 L. Ed. 2d 420 (1979).) That is not correct – hence the constitutional right to have this Court review the agency decision. It is true that in United Cerebral Palsy of New York City & Local 2, United Fed'n of Teachers, Am. Fed'n of Teachers, Afl-Cio, 347 NLRB 603 (2006) and Kendall Coll. of Art, 288 NLRB 1205 legal interpretation is reserved for the federal courts, and

ultimately the United States Supreme Court. The cases Respondent cites (on page 15 of its Brief) for its argument that it may (as it has here) define the "materiality" requirement down to a nullity are easily distinguishable.[1] Similarly, it is true that the Court will normally defer to the NLRB's findings of fact, but only where those facts are supported by substantial evidence. 29 U.S.C.A. § 160(e) (West). The question is therefore whether Respondent's legal determinations are correct, and whether there is substantial evidence to support those determinations.

2. A Policy Change with No Actual Impact on Employees' Work Conditions Cannot Constitute a "Material" Change in Terms and Conditions

The NLRB, in its decision, stated that a change in handbook language which has ***no effect at all*** on terms and conditions may nevertheless be "material" for this analysis. (Petitioner's Addendum at 6.) "[R]egardless as to whether it actually modified employee hours, the handbook change amounted to a unilateral change."

---

[1] *Ford Motor Company* involved a situation where the company made an admitted change to actual practices (pricing of certain items offered for sale to employees), but then argued the change was "trivial." Preiser v. Rodriguez, 411 U.S. 475, 501, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). *American Oil Co. v. NLRB* involved an actual and admitted change to employees' schedules. Am. Oil Co. v. N.L.R.B., 602 F.2d 184, 187 (8th Cir. 1979). El Paso Elec. Co. v. N.L.R.B., 681 F.3d 651, 657-58 (5th Cir. 2012) involved a change to an admitted, long-time past practice of allowing employees to aggregate their breaks and lunch period into one long break. The policy, which provided for three different break periods, had never been enforced. Without bargaining, the company banned the practice of aggregating, and began strictly enforcing (for the first time) the break policy. N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc., 174 F.3d 13, 29-30 (1st Cir. 1999) involved a change in timekeeping practices by the company. Without more, that change may not have qualified, but the Employer also imposed (without bargaining) fines in relation the timekeeping system. The Board, and the Court of Appeals, properly found such a change to be a violation.

Id. In support of this rather bold proposition, the NLRB relied on two cases, United Cerebral Palsy of New York City & Local 2, United Fed'n of Teachers, Am. Fed'n of Teachers, Afl-Cio, 347 NLRB 603 (2006) and Kendall Coll. of Art, 288 NLRB 1205 (1988). The Board cited these cases in support of its conclusion that a handbook language change alone, *with no real-world impact*, nevertheless constitutes an unlawful material unilateral change. (Petitioner's Addendum at 6.) On pages 27-28 of its Brief, Parsons explained in great detail why these cases do not support the Board's argument. In each case, the employer changed specific employment *practices*. In each case, those actions changed ***specific, negotiated provisions of the collective bargaining agreement***. In the case of *United Cerebral Palsy*, the employer's actions were so egregious that it asked employees to sign an acknowledgement that the employer had the right to change terms and conditions without consulting anyone, including the union. Clearly, neither case is on point. Respondent, in its brief, makes no effort to argue to the contrary. Instead, it simply states (in a footnote, on page 14) that the Board "properly relied" on these cases, with no analysis or factual inquiry. One may assume, therefore, that no counter argument exists. The Board's legal authority is not on point, and is not persuasive. There is no authority stating that a language change in a policy, without at least *something* more, constitutes an illegal, material unilateral change.

3. The 2012 Handbook Changes did not Change any Term or Condition

The question is therefore whether anything actually *did* change as a result of the new handbook language. Initially, the two versions of the break language, while not identical, function identically. The two versions each allow Parsons to determine when, or if, afternoon breaks are given to employees. The difference between the two handbook versions is that one said breaks would "normally" be given in the afternoon, but that Parsons could change that practice depending on job needs ("Each jobsite will establish specific break policies…"). The second version simply says that Parsons will "establish specific break policies" for each job. Both versions refer to jobsite expectation sheets as the method by which Parsons would establish these policies.

For purposes of showing that the language change did not "materially" affect terms and conditions, Parsons argued that no "material" change in provision of breaks has occurred. Respondent argues to the contrary in its brief, but its equivocal language belies that argument:

- "The 2005 Policy establishes a standard number and duration of daily breaks … *in the absence of divergent jobsite-specific circumstances*."[2] (Respondent's Brief at 8-9, emphasis added.)

[2] "Divergent circumstances" appears nowhere in the policy (or the Record, for that matter). Respondent suggests *sub silentio* that certain (unnamed) circumstances must exist before the two-break policy could be changed. Since there is no limit on this (made up) requirement, presumably Parsons would have to decide whether "divergent circumstances" exist.

- "[B]efore 2012 employees ***fairly consistently*** took 15-minute morning and afternoon breaks." (*Id*. at 9, emphasis added.)

- "[T]he 2005 Break Policy permits individual jobsites to deviate from [the two-break] standard on particular circumstances.…"[3]

Obviously, Respondent recognizes that there was no hard and fast rule requiring afternoon breaks prior to 2012. Instead, it makes the argument that the 2005 language created a loose "benchmark" or "default standard" regarding provision of breaks. (Respondent's Brief at 18.) On the other hand, according to Respondent, the new 2012 "[b]reak policy merely announces Parsons' unbridled intention to do as it pleases with respect to this employment term." (*Id*. at 17.) This last statement gets to the nub of the disagreement between Parsons and Respondent. First, Respondent ***never***, in its entire brief, explains how Parsons was, prior to 2012, "bridled" or otherwise constrained in its ability to schedule breaks prior. It recognizes that Parsons can (and did) issue jobsite expectation forms setting break schedules prior to 2012. It recognizes there were undefined "particular circumstances" which would alter or even do away with afternoon breaks. To summarize, Respondent believes the "default standard" contained in the handbook before 2012 guaranteed the employees something, despite the admitted fact that Parsons could (and sometimes did) and did take away that "something," at its

[3] "Individual jobsites" is language made up by Respondent, and presumably refers to Parsons issuing (at its discretion) jobsite expectation sheets for each job. "Particular circumstances" is entirely absent from the policy, and undefined by Respondent. Again, the decision as to what constitutes "particular circumstances" clearly rests with Parsons.

discretion and depending on its view of business requirements. The new language contains no "default standard," but instead simply states that Parsons will set break schedules, at its discretion, and depending on its view of business requirements. Employees continue to take breaks when circumstances allow. Nothing in the 2012 handbook changes anything. As described above, a change cannot be "material" when it accomplishes nothing. Respondent's position is incoherent. It should be rejected.[4]

Finally, notwithstanding the language from Respondent's own brief (which acknowledges that break scheduling was always subject to change), Respondent goes on to argue that before 2012 afternoon breaks were always provided in some fashion. (Respondent's Brief at 24.) This argument is not supported by substantial evidence. First, Joel Moryn and Brad Bacon all testified that before 2012 afternoon breaks were sometimes not provided. (*E.g.*, App. 137-40, 232-37, 253.) This testimony was unrebutted, and the ALJ did not discredit it. At least eight unit employees testified about a great deal of variation on how breaks are scheduled. Respondent discounts their testimony as not constituting "competent evidence," but it is not clear why it should be considered incompetent. A simple reading of the testimony shows that afternoon breaks were scheduled in *many* different ways, both before and after 2012. Respondent's own Brief acknowledges that some pre-

[4] The handbook language change also clarifies the longstanding practice of providing breaks when appropriate, as determined by Parsons.

2012 projects did not have afternoon breaks. (*E.g.*, Respondent's Brief at 24, n.9 and language quoted at page 4, *supra*.) There does not appear to be a serious dispute on the record that scheduling of breaks has always been at least somewhat flexible. The plain language of both handbook versions confirms that – there is no other logical reading of the pre-2012 handbook. Without a clear change in an employment practice, there can be no "material" change for purposes of this analysis. Without a "material" change, Parsons has not violated section 8(a)(5) of the Act.

Parsons Electric continues to provide breaks to its employees to the maximum extent possible under the circumstances. It continues to establish jobsite schedules consistent with safety, efficiency and customer satisfaction. If Parsons is required to revert to its previous handbook language (presumably for this local union only?), it will continue to do exactly as it did prior to 2012. Nothing will change. The Union failed to obtain a guaranteed afternoon break in during bargaining. It failed again when it brought the initial (unsuccessful) Unfair Labor Practice Charge.[5] The Respondent now attempts to salvage the Union's efforts by

[5] Respondent claims there is no evidence that the original charge (which claimed a binding past practice of giving afternoon breaks) was recommended for dismissal. On the record, Respondent is correct. The Court may take judicial notice, however, that it is the NLRB's longstanding practice to inform a Charging Party (the Union in this case) that it has found no merit to a Charge, and give the Charging Party the opportunity to withdraw the Charge. That is what happened here.

imposing language which at least mentions (but does not guarantee) specific breaks. This represents an overreach by the NLRB, and an interpretation of the law not supported by the statute. Respondent's request for enforcement should be denied.

Dated: March 27, 2015

/s/ Alec J. Beck

Alec J. Beck (#201133)
FORD & HARRISON LLP
225 South Sixth Street, Suite 3150
Minneapolis, Minnesota 55402
Telephone: 612.486.1700
Facsimile: 612.486.1701

ATTORNEYS FOR PETITIONER/CROSS-RESPONDENT PARSONS ELECTRIC LLC

CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation, typeface requirements, and type style requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Date: March 27, 2015

/s/ Alec J. Beck

Alec J. Beck (#201133)
FORD & HARRISON LLP
225 South Sixth Street, Suite 3150
Minneapolis, Minnesota 55402
Telephone: 612.486.1700
Facsimile: 612.486.1701

ATTORNEYS FOR PETITIONER/CROSS-RESPONDENT PARSONS ELECTRIC LLC

WSACTIVELLP:7470920.1